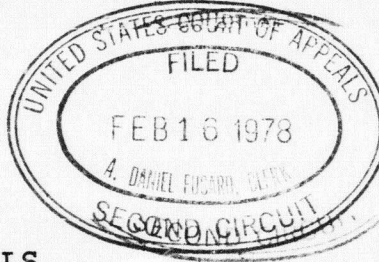


***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-5035



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In the Matter of

ADELPHI HOSPITAL CORPORATION,

Bankrupt.

-----X

BRIEF FOR APPELLANT NEW YORK
STATE DEPARTMENT OF HEALTH

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BRIEF FOR APPELLANT NEW YORK
STATE DEPARTMENT OF HEALTH

Question Presented

Whether the order of the Bankruptcy Court, affirmed by the District Court, granting the trustee in bankruptcy permission to abandon the bankrupt's patient records was within its jurisdiction or was arbitrary, capricious and illegal?

Statute and Regulations Construed

N.Y. Public Health Law, § 206-a(11)a provides:

"Governing body" means the group of the individuals ultimately responsible for a hospital's general policies and shall include but not limited to, a board of trustees, a board of directors, a board of governors, a board of managers, a medical board, a director of

any other official of a hospital with comparable responsibilities."

Title 10, N.Y. Codes Rules & Regulations, Sec. 720.20 provides in pertinent part:

"(q) In the event that a hospital discontinues for any reason whatsoever, the governing authority shall maintain, store and service in the city in which the hospital is located all medical records for a period of not less than six years.* The governing authority shall notify the department in writing where the medical records will be stored and serviced."

Statement of the Case

This is an appeal from an order of the District Court for the Eastern District of New York (Hon. George C. Pratt, J.) (52a)** entered October 19, 1977, affirming an order of the Bankruptcy Court (Hon. Joseph V. Costa, J.) (48.3a) entered May 14, 1976, authorizing the trustee in bankruptcy to abandon the patient records of the bankrupt, Adelphi Hospital Corporation. Pending the determination of the appeal to the District Court, the records were placed in storage by order of the Bankruptcy Court, where they have remained to date.

* Sec. 720.20(1) requires maintenance of the records that at least six years after an infant reaches majority.
** Numbers in parentheses followed by "a" refer to pages of the Appendix.

By order to show cause dated October 7, 1975, the trustee in bankruptcy moved for leave to abandon the patient records. Initially, the City of New York was cited as the respondent. When it proved to be the improper party, the motion was renoticed and the New York State Department of Health served (6a).

At the hearing before the Bankruptcy Court, November 10, 1975, the application was opposed orally, the State relying on 10 NYCRR Sec. 720.20(q), (5-6a) a regulation having the force of law. Violation of State Health Department regulations is punishable by both civil and criminal penalties, N.Y. Public Health Law Secs. 12, 12-b.

The trustee's application was granted in a decision dated March 22, 1976 (35a).

The Decisions Below

Although the Bankruptcy Judge recognized that there was a substantial public interest in the maintenance of the records (40, 45a) and that these documents were not "property" in the normal sense (46-47), both the decision and the minutes of the hearings of October 22 and November 10, 1975 reflect

an institutional annoyance with this matter; raising as it did a problem outside the normal commercial business of that Court (14a, 24-31a).

The Court went on to hold that since there could be no pecuniary return in the medical records, the trustee was free to abandon them (44-47a). He declared the records to be "non-property" (47a) and found the "governing body" of the bankrupt to be "non-existent" (46-47a), taking the position that the obligation to keep and administer the patient records should be carried out without benefit of any of the bankrupt's assets (46-47a).*

On appeal to the District Court, the order was affirmed essentially on the reasoning of the Bankruptcy Judge (56-59a), from which order the State Department of Health appeals (60a).

* In addition, the Court criticized counsel for representing his client's policy position, (41-43a). Although no written memorandum was submitted (42a), it was because the position of the Health Department was unchanged and because no additional authorities could be offered at that time. The Court's reference, ibid, to "many phone calls" by its office staff to counsel, appears to have resulted from telephone messages which were never delivered.

ARGUMENT

STORAGE AND ADMINISTRATION OF THE
BANKRUPT'S PATIENT RECORDS SHOULD
BE ALLOWED AS AN EXPENSE OF ADMINI-
STERING ITS ESTATE.

The New York State Health Department contends that the obligation to store and administer patient records should be treated as an expense of administration under Bankruptcy Act §§ 62(a)(1) and 64. (11 U.S.C. §§ 102a[1]; 104)

The Supreme Court of the United States has recognized that:

"The very language of § 64a(1) ('including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition') necessarily indicates items include some in addition to those that preserve or develop the bankrupt estate."

Otte v. United States, 419 U.S. 43, 57 (1974) (emphasis added).

The safe custody of the bankrupt's property is a well-recongized expense of administration, In re North Atlantic & Gulf S.S. Co., 102 F. Supp. 107, 110 (S.D.N.Y., 1961).

A hospital, by its nature, is never without assets to fund the storage and administration of patient records. It will have a substantial capital plant; as well as outstanding

receivables from third-party payors such as Blue Cross, Medicare and Medicaid. This should always assure sufficient assets for such administrative expenses.

It should be emphasized that the State Health Department regulation at bar is an exercise of the State's police power to legislate for the promotion of the public health, safety, welfare and morals, Universal Interpretive Shuttle Corp. v. Washington Area Metropolitan Transit Commission, 393 U.S. 186, 192, f.n. 5 (1969), citing Munn v. Illinois, 94 U.S. 123, 145 (1877). Section 720.20(q) promotes the public health, see e.g., Jacobson v. Massachusetts, 197 U.S. 11 (1905), by seeking to insure the availability of medical records that may be needed for the future treatment of the patient. It also seeks to prevent a failure of justice in the event of any legal action arising out of the patient's medical condition, the care and treatment furnished by the doctor or hospital that kept the records, as well as by others who may treat the patient. Thus, the public interest in maintaining these records is obvious. With the present trend toward the closing of redundant, usually financially unstable or bankrupt hospitals, the problem presented herein is likely to recur. The instant case is one of several that have raised the issue at bar. An appeal is presently pending in Matter of Park East Corporation, 76 B 1141 (S.D.N.Y., Ryan, B.J.) which relied upon the instant case.

The duty to maintain the patient records is an obligation of the bankrupt no less important than an obligation to pay for goods sold and delivered. It falls of necessity, to those who succeed to the bankrupt's interests, if the "governing body" is unwilling or unable to do so. In opposing the trustee's application to abandon the records and, in effect, placing the burden upon the estate of the bankrupt, the State both vindicates its police power and acts in harmony with the purpose of the bankruptcy act to provide for the orderly discharge of the bankrupt's obligations, cf. Perez v. Campbell, 402 U.S. 637, 648-650 (1971) and Williams v. Dept. of Social and Health Services, 529 F. 2d 1264, 1266, 1269 (9th Cir. 1976).

CONCLUSION

THE ORDER APPEALED FROM SHOULD
BE REVERSED.

Dated: New York, New York
February 14, 1978

Respectfully submitted,

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